

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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9	THERESE C. MASSON,	)	Case No. 12-05335 SC
10		)	
11	Plaintiff,	)	ORDER GRANTING MOTION TO
12		)	<u>DISMISS</u>
13	v.	)	
14		)	
15	SELENE FINANCE LP, et al.,	)	
16		)	
17	Defendants.	)	
18		)	

**I. INTRODUCTION**

Plaintiff Therese C. Masson ("Plaintiff") brings this action in connection with the foreclosure and sale of her property. Now before the Court is a Rule 12(b)(6) motion to dismiss the action brought by Defendants Selene Finance, LP ("Selene"), SRMOF 2009-1 Trust; Selene RMOF REO Acquisition LLC, U.S. Bank Trust National Association, and Selene RMOF LLC (collectively, "Defendants"). ECF No. 11 ("Mot."). The Motion is fully briefed, ECF Nos. 17 ("Opp'n"), 18 ("Reply"), and appropriate for determination without oral argument. For the reasons set forth below, the Motion is GRANTED and Plaintiff is granted leave to amend.

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1 **II. BACKGROUND**

2 Plaintiff alleges that she is the owner of real property  
3 located on Oakland Avenue in Oakland, California ("the Property").  
4 ECF No. 1 (Notice of Removal ("NOR")) Ex. 1 ("Compl."). A deed of  
5 trust recorded in Alameda County indicates that Plaintiff obtained  
6 an \$875,000 loan from Option One Mortgage Corporation in 2006 that  
7 was secured by a deed of trust on the Property. ECF No. 12  
8 (Request for Judicial Notice ("RJN")) Ex. 1.<sup>1</sup> Plaintiff alleges  
9 that she borrowed money from Defendants' predecessor-in-interest in  
10 order to use the Property, a duplex, "as a live-work property for  
11 retirement, or as an investment rental property to support  
12 Plaintiff's retirement." Compl. ¶ 12. On April 22, 2010, a notice  
13 of default was recorded against the Property, and on August 31,  
14 2012, a notice of trustee's sale was recorded. RJN Exs. 8, 10.  
15 The trustee's sale was initially set for September 26, 2012, but  
16 was later postponed to October 30, 2012 and then postponed again to  
17 November 30, 2012. See Opp'n at 2.

18 Plaintiff filed the instant action in state court on September  
19 25, 2012 -- one day before the originally scheduled trustee's sale.  
20 The Complaint asserts two causes of action: (1) violation of  
21 California Civil Code section 2923.5 and (2) violation of the Fair  
22 Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692g. Compl.

23 <sup>1</sup> Plaintiff's objections to Defendants' RJN are OVERRULED and the  
24 Court takes judicial notice of the deed of trust and the other  
25 publicly filed documents attached to the RJN, but not the truth of  
26 the matters asserted by those documents. Pursuant to Federal Rule  
27 of Evidence 201, the Court may take judicial notice of "a fact that  
28 is not subject to reasonable dispute" because, among other things,  
it "can be accurately and readily determined from sources whose  
accuracy cannot reasonably be questioned." Accordingly, the Court  
"may properly take notice of public facts and public documents."  
Cactus Corner, LLC v. U.S. Dept. of Agric., 346 F. Supp. 2d 1075,  
1098 (E.D. Cal. 2004).

¶¶ 1-16. Plaintiff alleges that Defendants failed to comply with the notice requirements of section 2923.5, which allegedly requires that "lenders and/or servicers actively seek to help prevent foreclosures of residential properties by aiding homeowners with a review of their financial situations . . . ." Id. ¶ 6. Plaintiff further alleges that Defendants "engaged in unfair debt collection practices by scheduling a trustee sale on September 26, 2012, which it refused to postpone." Id. ¶ 9. As to the FDCPA, Plaintiff alleges that Defendants breached their obligations under 15 U.S.C. § 1692g by failing to provide Plaintiff with a "Debt Validation Notice" and by taking action contrary to Plaintiffs' rights under California Civil Code sections 2923.5 and 2923.6. Id. ¶ 15. Plaintiff prays for an injunction staying the trustee sale and damages, among other things.

The day after Plaintiff filed her complaint in state court, she moved for a temporary restraining order ("TRO"). NOR ¶ 1. The state court granted the TRO, setting a hearing on a preliminary injunction for October 18, 2012. Id. ¶ 2. On October 16, 2012, Defendants removed to federal court. On November 30, 2012 -- a few hours before the last scheduled trustee's sale -- Plaintiff filed an ex parte application for a TRO. ECF No. 15. The application was denied by this Court. ECF No. 16. Plaintiff avers that the trustee's sale then went forward as scheduled on November 30. See Opp'n at 3.

On November 16, 2012, two weeks prior to the trustee sale, Defendants moved to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

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**III. LEGAL STANDARD**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 663. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it" and "sufficiently plausible" such that "it is not unfair to require the opposing party to be subjected to the expense of discovery." Starr v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

**IV. DISCUSSION**

Defendants move to dismiss on the grounds that (1) Plaintiff's claims are barred by the doctrine of tender; (2) California Civil Code section 2923.5 is inapplicable; and (3) foreclosing on a property pursuant to a deed of trust is not a debt collection

1 within the meaning of the FDCPA. The Court addresses each of these  
2 arguments below.

3 **A. Tender**

4 Defendants first argue that the Complaint cannot state a claim  
5 because Plaintiff has not alleged that she is willing or able to  
6 tender a sum sufficient to cure her default. Mot. at 3.  
7 Defendants' argument is misplaced. As Defendants' own authority  
8 states, an allegation of tender is generally only required where a  
9 plaintiff seeks to cancel a voidable trustee sale. See FPCI RE-HAB  
10 01 v. E & G Invs., Ltd., 207 Cal. App. 3d 1018, 1021 (Cal. Ct. App.  
11 1989). Here, Plaintiff filed the Complaint and Defendants filed  
12 their motion to dismiss prior to the trustee's sale, i.e., before  
13 there was a voidable sale to cancel. Indeed, Plaintiff has yet to  
14 formally request a cancellation of the trustee's sale. The  
15 Complaint merely seeks a stay of the trustee's sale (which has  
16 since occurred) and damages. Accordingly, the tender rule does not  
17 bar Plaintiff's claims as pled.

18 **B. Civil Code Section 2923.5**

19 Defendants also argue that Plaintiff's claim under California  
20 Civil Code section 2923.5 fails because the Property is not  
21 Plaintiff's principal residence. Mot. at 4. Pursuant to Civil  
22 Code section 2924.15(a), section 2923.5 only applies to "deeds of  
23 trust that are secured by owner-occupied residential real property  
24 containing no more than four dwelling units."<sup>2</sup> For the purposes of  
25 section 2923.5, "'owner-occupied' means that the property is the  
26 principal residence of the borrower and is security for a loan made

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27 <sup>2</sup> Defendants mistakenly cite to Civil Code section 2923.5(h)(3)(i)  
28 for the proposition that section 2923.5 only applies to owner-  
occupied property. Mot. at 4. That subsection has been repealed.

1 for personal, family, or household purposes." Cal Civ. Code §  
2 2924.15(a).

3 The Court concludes that section 2923.5 does not apply here  
4 because, by Plaintiff's own admission, the Property is no longer  
5 owner occupied. According to the Complaint, Plaintiff intended to  
6 use the Property "as a live-work property for retirement, or as an  
7 investment rental property to support . . . retirement." Compl. ¶  
8 12. It is unclear what Plaintiff means by "live-work property,"  
9 but the Property clearly would not be owner-occupied if it was  
10 rented to another. In her opposition brief, Plaintiff confirms  
11 that she does not currently live at the Property. Opp'n at 3.  
12 However, she contends that it continues to serve as her "principal  
13 residence" because she "lived in the property for a considerable  
14 amount of time and has retained it as a primary residence for mail  
15 contact and office residence, to date." Id. But the Property  
16 could hardly be considered owner-occupied or a principal residence  
17 if it is used only for business and mail-forwarding purposes.

18 Even if the Property were owner occupied, Plaintiff's claims  
19 under section 2923.5 are now moot. The only remedy available under  
20 section 2923.5 is the postponement of a foreclosure sale until the  
21 requirements of the statute have been met. Shaterian v. Wells  
22 Fargo Bank, N.A., 829 F. Supp. 2d 873, 886 (N.D. Cal. 2011)  
23 (citing Mabry v. Super. Ct., 185 Cal. App. 4th 208, 213 (Cal. Ct.  
24 App. 2010)). In this case, the foreclosure sale has already taken  
25 place.

26 Accordingly, Plaintiff's claim for violation of Civil Code  
27 section 2923.5 is DISMISSED WITH PREJUDICE.

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1           **C.     FDCPA**

2           Finally, Defendants argue that Plaintiff's FDCPA claim fails  
3 because foreclosing on a deed of trust does not qualify as debt  
4 collection under the Act. Mot. at 6. To state a claim under the  
5 FDCPA, a plaintiff must allege, among other things, "that the  
6 defendant is a debt collector within the meaning of 15 U.S.C. §  
7 1692a(6)." Geist v. OneWest Bank, C 10-1879 SI, 2010 WL 4117504,  
8 at \*2 (N.D. Cal. Oct. 19, 2010). Under 15 U.S.C. § 1692a(6), "the  
9 term 'debt collector' means any person who uses any instrumentality  
10 of interstate commerce or the mails in any business the principal  
11 purpose of which is the collection of any debts, or who regularly  
12 collects or attempts to collect, directly or indirectly, debts . .  
13 . ." This Court has previously held that "foreclosing on a  
14 property pursuant to a deed of trust is not a debt collection  
15 within the meaning of the . . . FDCPA." Gamboa v. Tr. Corps, 09-  
16 0007 SC, 2009 WL 656285, at \*4 (N.D. Cal. Mar. 12, 2009).

17           Plaintiff argues that the Court should defer to the Consumer  
18 Financial Protection Bureau's (the "Bureau") position on the matter  
19 since that agency is charged with enforcement of the FDCA. Opp'n  
20 at 8. Specifically, Plaintiff points to an amicus brief filed by  
21 the Bureau in the Eleventh Circuit in 2011, in which the agency  
22 argued that an entity meeting the general definition of "debt  
23 collector" under the FDCPA qualifies as a debt collector for the  
24 purposes of the Act, even if its principal purpose is enforcing a  
25 security interest. See ECF No. 17-7 ("Amicus Br.") at 14. Courts  
26 will defer to a federal agency's interpretation of its own  
27 regulations, advanced in a legal brief, unless that interpretation  
28 is "plainly erroneous or inconsistent with the regulation." Chase

1 Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011). Further,  
2 "considerable respect is due the interpretation given [a] statute  
3 by the officers or agency charged with its administration." Ford  
4 Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (quotations  
5 omitted).

6 Nevertheless, nothing in the Bureau's amicus brief suggests  
7 that the FDCPA is applicable here. That brief concerned a case in  
8 which the defendant, a loan servicer, allegedly called the  
9 plaintiffs multiple times on a daily basis in an effort to collect  
10 on the plaintiff's mortgage payments. Birster v. Am. Home Mortg.  
11 Servicing, Inc., 481 F. App'x 579, 580-81 (11th Cir. 2012). The  
12 defendant also sent the plaintiffs correspondence expressly stating  
13 "THIS IS AN ATTEMPT TO COLLECT A DEBT." Id. at 580. In contrast,  
14 there are no plausible allegations of debt collection here.  
15 Plaintiff cryptically alleges that one of the defendants, Selene  
16 Finance, "used the US Mail to solicit money from Plaintiff after  
17 the default . . . ." Compl. ¶ 14. But the content of this  
18 solicitation is not alleged.

19 In its amicus brief, the Bureau argued that a defendant that  
20 engages in debt collection should not be exempt from the provisions  
21 of the FDCPA merely because that defendant is also involved in a  
22 foreclosure. See Amicus Br. at 8-10. However, the Bureau did not  
23 argue that foreclosure, by itself, constitutes a debt collection  
24 activity. In fact, the Bureau expressly declined to address that  
25 issue:

26  
27 Although the district court suggested that pursuing  
28 foreclosure, by itself, cannot constitute debt  
collection covered by the [FDCPA], the Court need not  
reach that question here. At a minimum, seeking



1 payment from a debtor unquestionably qualifies as debt  
2 collection, even if it occurs in the context of  
3 foreclosure proceedings. The [plaintiffs] allege that  
4 [the defendant] repeatedly attempted to induce them to  
pay amounts owed on their mortgage. That was debt  
collection even though it occurred in the context of  
foreclosure proceedings.

5 Id. at 12. In this case, Plaintiff has merely alleged that  
6 Defendants engaged in foreclosure proceedings. Without more,  
7 Plaintiff cannot state a claim under the FDCPA.

8 Accordingly, the Court DISMISSES Plaintiff's FDCPA claim with  
9 leave to amend. Plaintiff's amended complaint should specifically  
10 allege how Defendants engaged in debt collection activities and  
11 clearly distinguish between the actions of each Defendant.  
12

13 **V. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS Defendants' motion  
15 to dismiss. Plaintiff Therese C. Masson's first cause of action  
16 for violation of California Civil Code section 2923.5 is DISMISSED  
17 WITH PREJUDICE and her second cause of action for violation of the  
18 FDCPA is DISMISSED WITH LEAVE TO AMEND. Plaintiff shall amend her  
19 Complaint within thirty (30) days of the signature date of this  
20 Order. Failure to do so may result in dismissal of this action  
21 with prejudice.  
22

23 IT IS SO ORDERED.

24  
25 Dated: January 24, 2013

  
UNITED STATES DISTRICT JUDGE